No. 93-781

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In The

Supreme Court of the United States

October Term, 1993

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON and ANDREW HAYDEN,

Petitioners,

vs.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STEELE; GARRIA SPENCER; JAMES FOLSOM, Governor of the State of Alabama; JIM BENNETT, Secretary of State,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

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Questions Presented

In *Growe v Emison*, __ US __, 113 SCt 1075, 122 LEd2d 388 (1993), this Court reversed a district court for failing to defer to a state court in a redistricting case. In light of that case, the following questions are presented here:

1. Where the State's failure to adopt a valid congressional redistricting plan led the district court to adopt its own interim plan in time for the 1992 elections, did the courts below err in barring a state court from adopting a plan for the 1994 elections?

2. Where the district court's 1992 order acknowledged that its interim plan would be superseded if the Legislature adopted a plan for subsequent elections, did the courts below err by not according similar deference to the state judicial process?

3. Do principles of federalism bar federal courts from transforming their interim redistricting plans into permanent ones by enjoining the State's judicial redistricting process?

Petitioners' Reply in Support of Certiorari

The parties in this case represent fundamentally different points of view. Petitioners, supported by the chief officers of the State of Alabama, rely on the primacy of state institutions (whether legislative or judicial) in the redistricting process, a primacy recently reaffirmed in *Growe v Emison*, 113 SCt 1075 (1993). Respondents, by contrast, argue that state legislatures and state courts have different degrees of primacy, so that whereas a state legislature can adopt a redistricting plan at any time, a state court can act only up to the time when a federal court adopts an interim plan.

Respondents' position trivializes *Growe v Emison* and misstates the roles of both the federal courts and the state courts.

1. The basic rule of *Growe v Emison* is a rule of federalism. It recognizes that redistricting is a state matter, and under our Constitution, that means it is up to the State to decide which of its institutions shall play which role in that matter. As this Court said in *Erie R. Co. v Tompkins*, 304 US 64, 78 (1938):

> "And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Accordingly, if the State of Alabama is empowered to adopt a redistricting plan which supplants a federal court's interim plan, the rule of federalism dictates that it is for

the State of Alabama to choose which of its institutions may adopt its plan.[1]

Rules like res judicata are essentially first-come first-serve rules, designed to provide some order in areas where there is none. In redistricting, though, the rules of federalism already provide order in the preference for state-drawn plans over federally drawn plans. To nullify that preference by a res judicata rule not only misuses the res judicata rule, but violates the precepts of *Growe* and *Erie*.[2]

2. A federal court draws a redistricting plan only to fill a gap left by the State. That is why it is called "interim." Yet the respondents here seek to attach permanence to the federal court's plan by labeling it a "plan for the rest of the decade." Op. Cert., p. 7.

As an interim plan designed only to allow an election to be held constitutionally, the federal court plan would not be "interfered with" simply because the State adopted its own plan for a later election. And if this is true, it makes no difference whether the State's plan for the later election is legislative or judicial.[3]

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[1]The States have employed a variety of methods to provide for congressional districting. Although legislative enactment is the usual method, states have redrawn congressional districts using assorted judicial and extra-judicial forums, including state courts of general jurisdiction protecting the constitutional rights of citizens.

[2]Or, put another way, what is the "repose interest" in an *interim* plan?

[3]Another interest of the citizenry is affected if the federal court plan lingers on: the preclearance protections of the Voting Rights Act, 42 USC § 1973c. Since a plan drawn by a federal court is an exception to the preclearance requirement, the continued use of the federal court plan in successive elections aggravates the exception. The consequences

(continued...)

3. Respondents finally suggest that the Alabama state courts may not even have jurisdiction to decide redistricting cases. That suggestion is flatly wrong, as the Alabama Supreme Court has specifically shown in just the past week in answering that precise certified question from a different federal court. *Brooks v Hobbie*, ___ So2d ___, 1993 Ala LEXIS 1197 (Ala, Dec. 22, 1993).

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[3](...continued)
are especially serious in this case where the federal court's interim plan uses the same features that led the U.S. Attorney General to issue a Voting Rights Act objection to a plan which had been adopted by the State Legislature.

In a covered jurisdiction like Alabama, a state court's redistricting plan—like a plan adopted by statute, but unlike a federal court plan—would have to be precleared before it could be implemented. *Hathorn v Lovorn*, 457 US 255 (1982). The ruling of the lower federal courts in the instant case if allowed to stand, will have the practical effect of denying black citizens of Alabama the protection of § 5 for an entire decade and will frustrate the careful preclearance scheme of the Voting Rights Act. If *Growe v Emison*'s principles of federalism were followed as this Court intended, black citizens like Darryl Sinkfield could require the Alabama courts to respond to the Legislature's default with a redistricting plan that would have to withstand § 5 scrutiny.

Conclusion

Nothing in *Growe v Emison* justifies the distinctions that Respondents would like to interpolate. This Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

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